IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.179 OF 2007

Manilal P. Gala .. Petitioner.

Versus

Damji P. Gala & Ors. .. Respondents.

Mr.Shailesh Shah i/b.Mansukhlal Hiralal & Co. for petitioner.

Mr.D.D.Madon i/b. M/s.Thakore Jariwala Associates for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 17TH JULY, 2007.

P.C.:

1. Heard Mr.Shah, appearing for the petitioner and Mr.Madon, appearing for the respondents.

2. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 and the reliefs prayed are as under :-

(a) That pending the hearing and final disposal of the Reference/Arbitration, this Hon'ble Court may be pleased to appoint the Court Receiver, High Court, Bombay as a receiver in respect of the shop Nos.6 of the property viz. Premsons House, situated at 63, Bhulabhai Desai Road, Mumbai-400 026 with all powers under Order 40 Rule 1 of the Code of Civil Procedure 1908.

(b) That pending the hearing and final disposal of the Reference/Arbitration, this Hon'ble Court may be pleased to pass an order of injunction restraining Respondents by themselves, their servants and agents from in any manner transferring, alienating or parting with the possession of Shop No.6 or any part thereof or carrying on business in any name from Shop No.6 in the said property viz. Premsons House, 83, Bhulabhai Desai Road, Mumbai - 400 026."

3. The petitioner had by virtue of Conveyance dated 27th April, 1978 alongwith respondent Nos.1 and 3 acquired co-ownership rights, according to him, in respect of property which has been more particularly described in paragraph 2 of the petition.

4. It is the case of the petitioner that on the ground floor of this property, there are shops which are occupied by various tenants. It is also his case that the petitioner and respondent Nos.1 and 3 are in possession of their respective tenements so also carrying on their businesses there from.

5. I am not concerned in this petition with the

business of the co-owners so also their rights with regard to this property. All that this petition projects is a grievance with regard to shop premises on the ground floor which is entitled as shop No.6, Premsons House, 83, Bhulabhai Desai Road, Mumbai - 400 026, which according to the petitioner is in possession of one G.V.Chimalkar and the co-owners recognise him as a tenant. It is not necessary to refer to the correspondence between parties inasmuch as none dispute the fact that Chimalkar has expired on 8th January, 2001 and his son Vasudev is claiming to be a tenant in respect of the said shop premises. The grievance of the petitioner is that there are certain disputes and differences between the co-owners and reference in that behalf is made to an agreement dated 19th December, 1990.

6. Thereafter, it is contended that the petitioner recently came to know that an attempt was made by the respondent Nos.2 and 4 to acquire the shop premises or get possession thereof and that is how a bogus partnership was entered into with Mr.Vasudev Chimalkar. He was given only a nominal share of 5%. The entire plan was to induct him and immediately retire him from the partnership so that the tenancy rights are transferred to the remaining partners.

7. In this behalf my attention is invited to a Deed of Partnership dated 24th September, 2006 and a Deed of Retirement. Mr.Shah has also invited my attention to the fact that the Partnership Agreement / Deed postulates that alongwith Mr.Vasudev Chimalkar one Mr.Avdhut Chimalkar, who is the cousin of Mr.Vasudev Chimalkar would also be inducted in the Partnership. The said Avdhut has no right insofar as the tenancy to the shop premises is concerned nor had he any connection with the business which was being carried on therefrom. The fact that he has been inducted itself would go to show that the monies which have been brought in as initial contribution by the partners are in consideration of the tenancy rights being transferred and it is quite likely that the said Avdhut would claim rights in respect of subject premises.

8. The principal contention of Mr.Shah is that the shop premises constitute an asset of the co-ownership and the petitioner cannot be excluded from the rights arising out of such co-ownership. He contends that behind the back of the petitioner, the existing tenancy in respect of shop premises cannot be transferred and in any event, the management of the business by a partnership to which the co-owners are parties, would demonstrate that the attempt is to deprive the petitioner of his share in the property contrary to the Agreement dated 19th December, 1990, and

more particularly, Clause 3(a) thereof. My attention is invited by Mr.Shah to Clause 3(a) of the agreement and he contends that the management of the business so also the property is for the benefit of all co-owners as stipulated therein and the moment any arrangement is arrived at by the respondents with regard to the business that should be shared with co-owners and more particularly the petitioner. However, without protecting the rights of the petitioner and instead defeating them, the subject partnership deed has been executed and there is further likelihood that the shop premises would thereafter not be available to the co-owners.

9. In all fairness, Mr.Shah has invited my attention to the Arbitration Petition filed with regard to some other premises, namely, Shop Nos. 8, 9 and 10. He submits that Arbitration Petition No.218 of 2002 was filed in this Court and this Court, by an order dated 30th September, 2002, while disposing of the petition, has observed that parties must go for arbitration.

10. Mr.Shah submits that the petitioner is ready and willing to appoint an Arbitrator, who would decide all claims arising out of the Agreement dated 19th December, 1990 and the subject premises so also the rights pertaining to it be included in the purview of the same.

In the light of the apprehension, that is, being made out by the petitioner, Mr.Shah submits that this is a fit case where this Court should, as and by way of interim measure, and considering that it is just and convenient to do so, appoint Court Receiver, High Court, Bombay as Receiver of the premises. Until he takes possession, there should be a restraint against the respondents from transferring, alienating or parting with the possession of the shop or any part thereof.

11. Mr.Madon, on the other hand, submits that this petition is not maintainable inasmuch as despite making identical grievance with regard to shop Nos.8, 9 and 10, and the petition being dismissed by this Court, no attempt has been made to refer the matter to arbitration at all from 2002 till 2007. No steps have been taken by the petitioner and there is no inclination nor genuine desire or willingness to submit the disputes to arbitration. He further submits that identical grievance with regard to the other shop premises has been considered by this Court and the judgement and order of this Court dated 30th September, 2002 would apply squarely to the facts of the present case.

12. In any event, and without prejudice, Mr.Madon submits that this is a mis-conceived and wholly untenable

petition. He also submits that the basis of the petition is that the tenancy rights are being dealt with, which is fallacious and incorrect. In fact, the co-owner has filed eviction suit against Vasudev Chimalkar and others in the Court of Small Causes Court at Bombay, which suit is pending. The respondents to this petition are parties to the said suit. In this behalf, it is his case that disputes with regard to tenancy rights cannot form subject matter of the arbitration. More so, when the premises are governed by Maharashtra Rent Control Act, 1999. In this behalf, Mr.Madon relies upon a decision of the Supreme Court in the case of **Navrang Studios v/s. Natraj Studios (Pvt.) Ltd. reported in AIR 1981 SC 537.**

13. Mr.Madon states that the Deed of Partnership does not touch the tenancy rights but it is the management of the business conducted from the shop premises which is a subject matter thereof. He submits that neither the possession of the premises is parted with nor tenancy rights are transferred, as apprehended. The tenancy rights continue as it is in the name of the deceased and their continuance is subject to the provision of law. This is not a case where the respondents have conferred any tenancy rights upon either Vasudev or Advhut, as contended. He submits that it is only the business which would be managed by partnership. The shop was conducting

a business in the name of **"Chimalkars"**. The shop will continue to be having a board of Chimalkars and the business also would the one which was carried on earlier by the deceased. In such circumstances, there is no apprehension that the rights of the petitioner with regard to the subject shop premises are being in any manner dealt with.

14. Mr.Madon further submits that appointing Court Receiver in respect of shop premises, which are tenanted, would defeat the provisions of the Rent Control Act and no injunction can be granted inasmuch as possession of the shop premises is not with the co-owners but with the tenant/person claiming to be a tenant. In these circumstances, there is no apprehension which can be said to be genuine and well founded for such drastic reliefs to be granted. For all these reasons, Mr.Madon submits that the petition be dismissed.

15. Mr.Madon also brings to my notice the fact that respondent No.4 Sohil Dhiraj Gala is not a party to the Arbitration Agreement dated 19th December, 1990, whereas Mr.Shah submits that the parties thereto are the group of Damji Premji Gala, Manilal P. Gala and Dhirajlal Premji Gala. Respondent No.4 is part of the group of Dhirajlal Premji Gala and Damji Premji Gala and at the relevant

time, was a minor. In such circumstances, it is false to say that he is not a party to the Arbitration Agreement.

16. With the able assistance of the learned counsel appearing for both sides, I have perused the petition, annexures thereto, reply affidavit and rejoinder to the same.

17. I am of the view that no larger questions be decided in this petition. The petition being for a limited relief and a limited right in respect of only one shop premises, it is not necessary to go into the rival contentions with regard to the rights of co-ownership, scope of Arbitration Agreement, parties covered thereby, the alleged attempt on the part of the respondents to deprive the petitioner of his share in respect of subject shop premises are all matters which are not being gone into by me and contentions of both sides in that behalf are expressly kept open.

18. Equally, I will not and cannot go into the question as to who is the tenant in respect of the subject premises. Needless to state that rival contentions even with regard to that aspect are kept open. More so, because it would not be fair to pronounce upon them in the absence of Chimalkars. Therefore, the forum, the ambit

and scope of Authority and power of Court and right of Chimalkars are all matters which are open for being agitated by both sides as also Chimalkars.

19. As far as the shop premises are concerned, prima-facie, there is substance in the contention of Mr.Madon that appointment of a Court Receiver even in respect of the business of **"Chimalkars"** would not be fair and proper. In this behalf, request of Mr.Shah is to appoint Court Receiver in respect of business which is being carried on from the shop premises. He submits that appointment of Receiver, only with regard to the business, would not jeopardise the rights of Chimalkars or the parties to this petition in respect of shop premises. However, even for that aspect to be gone into and considered, it would not be proper to do so in the absence of Chimalkars and without any material with regard to the business that is being carried on and the documents and related papers pertaining thereto. In other words, despite the Partnership Deed and the Retirement Deed, whether the respondents or some of them have exclusive rights to manage the business or it is one of the Chimalkars who can do so are all matters which must be gone into and decided in the presence of Chimalkars. It is not as if the petitioner is remedyless even with regard to the business from the shop premises. It is not as if

no application can be made in future for appointment of Court Receiver. Instant application, in the absence of aforesaid details, is not maintainable insofar as the main relief of appointment of Court Receiver.

20. However, that does not mean that the petitioner is not entitled to apply for protection and preservation of the shop premises. More so, when Mr.Shah, after taking instructions from the petitioner, who is present in Court, makes a statement that the petitioner would apply under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator/s to adjudicate upon the claims and counter claims arising out of Agreement dated 19th December, 1990 so also Deed of Partnership and the Deed of Retirement and the said application would be made within a period of four weeks from today. Since Mr.Shah states that the petitioner is ready and willing to go for the arbitration and in any event, considering the statement made by the respondents in affidavit, there is enough protection with regard to the shop premises, in my view, the present petition can be disposed of in the light of the statements on affidavit of respondents.

21. The respondents in their affidavit have specifically pointed out that no tenancy rights are being transferred in favour of the respondents and the third

parties continue to remain as tenants, who are not parties, to the Arbitration Petition.

22. In my view, protection, that is sought by the petitioner, is available in the light of the statement made by the respondents. Additionally, Mr.Madon after taking instructions, makes a statement that the tenancy rights in respect of the shop premises are not being transferred nor possession thereof would be parted with in any manner. In such circumstances, it is not necessary to grant any relief in terms of prayer clause (b) of the petition.

23. Needless to state that the statement made by the respondents on oath and reiterated before me during the oral arguments is accepted as Undertaking to Court. Further, needless to add that if petitioner is successful in getting the relief of appointment of Arbitrator/s, it would always be open for him to apply for such interim measures, including reiterating the relief in this petition and such an application would then be considered on its own merits and in accordance with law uninfluenced by any observations in this petition.

24. It would be open for the respondents to contend that no appointment of an Arbitrator could be made and

this aspect would be gone into by an appropriate forum. All contentions, which are available for parties in such proceedings, are expressly kept open. Equally, this order does not preclude the respondents from contending that the Arbitral Tribunal has no jurisdiction to adjudicate upon certain claims and all such contentions of both sides are also kept open. The respondents would be at liberty to oppose all applications for interim measures as well, and all contentions, which are available to them, are also kept open.

25. Needless to state that the statement made by Mr.Madon, learned Senior Counsel for the respondents, after taking instructions before me, shall remain operative for a period of 12 weeks from today.

26. The petition is disposed of in the light of the above statements with no order as to costs.

(S.C.Dharmadhikari, J.)